

CITY COUNCIL REPORT



Meeting Date: October 16, 2012
 General Plan Element: *Provide for the orderly administration of the affairs of the City*
 General Plan Goal: *Fiscal management*

ACTION

Adopt Resolution No. 9187 authorizing settlement of *Johnson v. Desert Mountain Properties, LP, et al.* Consider adopting Resolution No. 9187 authorizing the City to enter into Settlement Agreement Contract No. 2012-148-COS providing for the payment of \$50,000.00 to the City by Keith and Cheryl Johnson toward costs to be incurred by the City in relocating the main sewer line serving the Johnsons' residence. The Settlement Agreement will also provide for a waiver of all claims that were brought or could have been brought against the City in the lawsuit entitled *Keith A. Johnson and Cheryl A. Johnson, husband and wife; and the Keith A. Johnson Family Trust v. Desert Mountain Properties Limited Partnership; Newman Jolly Builders, LLC; City of Scottsdale et al.*, Cause No. CV 2010-051572, which is currently pending in the Maricopa County Superior Court.

Background

This case involves claims by Keith and Cheryl Johnson, who own property in the Desert Mountain master-planned community. The Johnsons' lawsuit alleges that sewer odors interfere with the Johnsons' use and enjoyment of their property. The Johnsons brought suit against the City, which maintains the sewer system that serves Desert Mountain, and against Desert Mountain and Newman Jolly, the developer and builder, respectively, of the property. The Superior Court dismissed the City as a Defendant based on a finding that the Johnsons had failed to file a timely notice of claim with the City before bringing suit. Despite its dismissal from the lawsuit, the City continued discussions with the parties because the Johnsons continued to report sewer odors and no repair or relocation of the sewer could be accomplished without the City's consent. The settlement will add funds to the City's budget and avoid any future litigation costs that could be incurred if the Johnsons' were to appeal the dismissal of the City as a Defendant after the conclusion of the case against the remaining Defendants. The relocation of the sewer may benefit other residents of the Desert Mountain community to the extent other residents have experienced sewer odors in the area.

ANALYSIS & ASSESSMENT

Recent Staff Action

City Attorney's Office representatives have engaged in numerous discussions with the parties regarding resolution of the issue.

Policy Implications

None

Significant Issues to be Addressed

None

Community Involvement

No community involvement is necessary on this item as this matter is in litigation.

RESOURCE IMPACTS

Available funding

The City is receiving funds, rather than paying out funds in this matter. Although relocation of the sewer is estimated to cost approximately \$428,000, funding for the relocation is currently available in the City's Water Resources Budget in an account specifically designated for sewer rehabilitation projects.

Staffing, Workload Impact

Settlement will eliminate the need for City Attorney's staff to litigate this matter should the City's dismissal be appealed.

Future Budget Implications

None

Cost Recovery Options

As noted, the City is receiving funds rather than paying them out.

OPTIONS & STAFF RECOMMENDATION

Recommended Approach

Adopt Resolution No. 9187 authorizing the City to enter into Settlement Agreement Contract No. 2012-148-COS.

Proposed Next Steps

Sign the settlement agreement, if approved.

RESPONSIBLE DEPARTMENT(S)

Water Resources Department
City Attorney's Office


STAFF CONTACTS (S)

10105283v1

City Council Report | Authorizing Legal Fees

Marshall Brown, Water Resources Executive Director, mbrown@scottsdaleaz.gov
Bruce Washburn, City Attorney, bwashburn@scottsdaleaz.gov

APPROVED BY



Marshall Brown, Water Resources Executive Director
(480) 312-5683
mbrown@scottsdaleaz.gov

10/9/12


Date



David Smith, City Treasurer
(480) 312-2364
dsmith@scottsdaleaz.gov

10-10-12

Date



Bruce Washburn, City Attorney
(480) 312-2405
bwashburn@scottsdaleaz.gov

Date

ATTACHMENTS

1. Resolution No. 9187
2. Contract No. 2012-148-COS

RESOLUTION NO. 9187

A RESOLUTION OF THE COUNCIL OF THE CITY OF SCOTTSDALE, MARICOPA COUNTY, ARIZONA, AUTHORIZING SETTLEMENT OF **KEITH A. JOHNSON ET AL. V. DESERT MOUNTAIN PROPERTIES LIMITED PARTNERSHIP; NEWMAN JOLLY BUILDERS, LLC; CITY OF SCOTTSDALE ET AL.**, CV 2010-051572, CURRENTLY PENDING IN SUPERIOR COURT, MARICOPA COUNTY, ARIZONA.

WHEREAS Keith and Cheryl Johnson (the "Johnsons") brought suit against, among others, the City of Scottsdale seeking to recover monetary damages for injuries resulting from alleged sewer odors in or around the Johnsons' residence; and

WHEREAS, although the City was dismissed from the lawsuit based on the court's finding that the Johnsons' notice of claim was not timely filed, the dismissal order could be appealed at the conclusion of the case against the remaining Defendants; and

WHEREAS it is in the best interest of the City to effectuate a settlement of the matter of *Keith A. Johnson and Cheryl A. Johnson v. City of Scottsdale, et al.*, Case No. CV2010-051572, currently pending in the Superior Court, Maricopa County, Arizona;

NOW, THEREFORE, BE IT RESOLVED by the City of Scottsdale, Maricopa County, Arizona, as follows:

Section 1. That the City Council hereby authorizes the City to accept \$50,000.00 to be paid by the Johnsons toward costs to be incurred by the City in relocating the main sewer line serving the Johnsons' residence;

Section 2. That the City's Water Resources Executive Director is authorized and directed to execute Settlement Agreement Contract No. 2012-148-COS to settle *Keith A. Johnson et al. v. Desert Mountain Properties Limited Partnership; Newman Jolly Builders, LLC; City of Scottsdale et al.*, CV 2010-051572, and to execute such other documents and take such other actions as are necessary to carry out the purpose of this Resolution.

PASSED AND ADOPTED by the Council of the City of Scottsdale this 16th day of October, 2012.

ATTEST:

CITY OF SCOTTSDALE, an Arizona
municipal corporation

By: _____
Carolyn Jagger, City Clerk

By: _____
W. J. "Jim" Lane, Mayor

APPROVED AS TO FORM:

OFFICE OF THE CITY ATTORNEY

By: W. H. L. For
Bruce Washburn, City Attorney

SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement (the "Agreement") is entered into and made effective this 3rd day of October, 2012, by and between Keith A. Johnson, Cheryl A. Johnson and The Keith A. Johnson Family Trust (collectively, "The Johnsons"), Desert Mountain Properties Limited Partnership, L.P. ("Desert Mountain Properties"), Newman Jolly Builders, L.L.C. ("Newman Jolly") and the City of Scottsdale, and are collectively referred to in this Agreement as "the Parties."

RECITALS

- A. On or about April 5, 2008, Plaintiff's Johnson entered into a written Home Purchase Contract (the "Contract") relative to the purchase of the Johnson Residence which is located within The Haciendas at 38638 N. 104th Street, Scottsdale, Arizona 85262 ("Johnson Residence").
- B. The Johnson Residence was placed, constructed, and is located, within a residential and recreational master-planned community commonly known as and referred to as The Haciendas within Desert Mountain ("Desert Mountain").
- C. Desert Mountain Properties was the developer of Desert Mountain, The Haciendas, and was also the Seller/Vendor of the Johnson Residence.
- D. Newman Jolly and its contractors were the builder of the Johnson Residence. Under Newman Jolly's contract with Desert Mountain Properties for the construction of the Haciendas (the "Construction Contract"), Newman Jolly was to name Desert Mountain Properties as an additional insured on its project related coverage. Pursuant to these provisions, Steadfast Insurance Company has made a demand for defense upon Central Mutual Insurance Company ("CMI") in connection with the claims asserted by the Johnsons. That demand is included in the releases set forth below.
- E. During the final walk-through prior to closing, unspecified odors were present and smelled in and about the Johnson Residence. Subsequent to the purchase of the Johnson Residence, the Johnsons learned that the unspecified odors were sewer odors which were smelled in, at and around the Johnson Residence.
- F. On April 14, 2010, the Johnsons filed their Complaint against Desert Mountain Properties and Newman Jolly in the Superior Court of Arizona, and later added the City of Scottsdale as a defendant. The matter is known as, Maricopa County cause number CV-2010-051572 (the "Lawsuit").

- G. The Lawsuit claimed and sought recovery of damages and remedies against Desert Mountain Properties, Newman Jolly and the City of Scottsdale as it related to the sewer odors.
- H. Desert Mountain Properties, Newman Jolly and the City of Scottsdale deny that they were responsible and/or at fault for the sewer odor and/or the damages and remedies claimed and sought by The Johnsons.
- I. The Parties desire and intend to resolve any and all claims which were asserted, or which could have asserted, between the Parties, in the Lawsuit.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by all Parties, the Parties agree as follows:

AGREEMENT & RELEASE

1. Consideration.

A. Desert Mountain Properties through its insurance carrier, Steadfast Insurance Company, agrees to pay a total of FOUR HUNDRED THOUSAND DOLLARS AND ZERO CENTS (\$400,000.00) To The Johnsons within 14 days of the City of Scottsdale's approval of the Agreement by its City Council.

B. Newman Jolly through its insurance carrier, Central Mutual Insurance Company ("CMI"), agrees to pay a total of FIFTY THOUSAND DOLLARS AND ZERO CENTS (\$50,000.00) to The Johnsons within 14 days of the City of Scottsdale's approval of the Agreement by its City Council.

C. The Johnsons agree to pay the total sum of FIFTY THOUSAND DOLLARS AND ZERO CENTS (\$50,000.00) to the City of Scottsdale as the Johnson's contribution to the repairs of the main sewer line as described in paragraph D, below, within 14 days of the City of Scottsdale's approval of the Agreement by its City Council.

D. The City of Scottsdale agrees to perform repairs to the main sewer line generally in accordance with the conceptual sewer relocation prepared by Gannett Fleming, dated December 16, 2010, a copy of which design for Job No.: 53521 is set forth as Exhibit A to this Agreement.

2. Dismissal of Lawsuit With Prejudice. The Parties agree to dismiss all claims in the Lawsuit with prejudice and to forego any further proceedings against any of the Parties involving any claims arising out of or relating to the Lawsuit, with every party to bear its own attorneys' fee and costs. The Parties will enter into and file the Stipulation for Dismissal with Prejudice which is set forth in Exhibit B to this Agreement, within (5) business days after the Consideration set forth in Paragraph 1 (A) – (C), above, has been satisfied by all the Parties.

3. Release. The Parties hereby agree to irrevocably release, acquit, and forever discharge and release each other, their employees, directors, successors, assigns, agents, attorneys, representatives, insurance company(ies) and excess carriers, and all affiliated companies from any and all present or future causes of action, suits, debts, liens, liabilities, claims, demands, damages, losses, fees or expenses of any nature whatsoever, known or unknown, fixed or contingent, which the parties may have or will have against each other arising out of or relating to the Lawsuit or the Contract. The release to become effective as to each party upon their respective performance of the consideration required of each party under this Agreement.

This release is not intended to release the City of Scottsdale from any duties and/or obligations which the City of Scottsdale owes under law to all property owners relating to the ongoing safe operation and maintenance of its utilities.

This release is not intended to and does not include any other obligations that Newman Jolly or CMI may owe Desert Mountain Properties under the Construction Contract or related policies for other work performed by Newman Jolly in the Haciendas. As between Desert Mountain Properties, Newman Jolly, and their respective carriers, this Agreement only encompasses the work that forms the basis for the lawsuit and that is released above by the Johnsons.

4. Binding Effect. The Parties each represent and warrant that they have full power and actual authority to enter into this Agreement and to carry out all actions required of them by this Agreement. This Agreement shall bind and inure to the benefit of all parties to this Agreement and their respective successors, heirs, personal representatives, and assigns, except that no party may assign, delegate or transfer any of its rights or obligations under this Agreement without prior written consent of the other Parties.

5. Attorney Fees, Costs & Expenses. If a dispute arises from this Agreement, the prevailing party shall be entitled to collect its reasonable costs and expenses, including reasonable attorneys' fees, from the losing party.

6. Entire Agreement. Other than noted above, this Agreement and the documents executed concurrently with it set for the Parties' complete agreement respecting its subject matter and supersedes the Contract and all prior agreements and negotiations.

7. Advice of Counsel. The Parties have entered into this Agreement after having received full advice from their respective legal counsel regarding the Agreement and all related matters. The Parties each agree that they have read this Agreement, that they fully understand its terms and ramifications, and that they signed this Agreement having had the opportunity for the advice, recommendation and approval of their independent legal counsel.

8. No Admissions of Liability. This Agreement does not constitute and shall not be construed as an admission of liability or responsibility on the part of any of the Parties. The Parties have entered into this Agreement solely for the purposes of avoiding further costs of litigation and for the purpose of buying their peace. This Agreement is a compromise of disputed, known and unknown, past, present and future claims. This Agreement, however, can be introduced as evidence in any action filed to enforce the terms of the Agreement itself.

9. Governing Law. The validity, construction and enforcement of this Agreement shall be governed by Arizona law. The Parties hereby consent to jurisdiction and venue of the courts of the State of Arizona for all purposes pertaining to this Agreement.

10. Language. The Parties have equally participated and had an equal opportunity to participate in the drafting of this Agreement. No ambiguity shall be construed against any party based upon a claim that party drafted the ambiguous language. The language of the Agreement shall be construed as a whole, according to its fair meaning, and any presumption or other principle that the language herein is to be construed against any party shall not apply.

11. Waiver. A waiver of any provision of this Agreement shall operate as a waiver only for the specific occasion as to which the waiver was given, and the provisions of this Agreement shall otherwise continue to be fully effective and operable as to any other occasion or occasions.

DATED: Oct 3, 2012

KEITH A. JOHNSON FAMILY TRUST

By: *Keith A. Johnson*

Print: Keith A. Johnson

Its: Trustee

STATE OF MICHIGAN

) SS

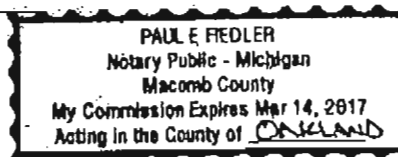
COUNTY OF OAKLAND

SUBSCRIBED AND SWORN to before me this 3rd day of October, 2012

Paul E. Fiedler

Notary Public

My Commission Expires:



DATED: Oct 3, 2012

KEITH A. JOHNSON

By: *Keith A. Johnson*

Print: Keith A. Johnson

Its: _____

STATE OF MICHIGAN

) SS

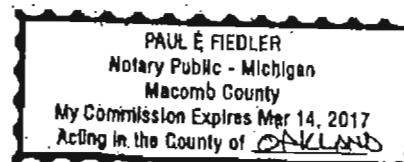
COUNTY OF OAKLAND

SUBSCRIBED AND SWORN to before me this 3rd day of October, 2012

Paul E. Fiedler

Notary Public

My Commission Expires:



Contract No.: 2012-148-COS

DATED: Oct 3, 2012

CHERYL A. JOHNSON

By: Cheryl A. Johnson

Print: Cheryl A. Johnson

Its: _____

STATE OF MICHIGAN)

) SS

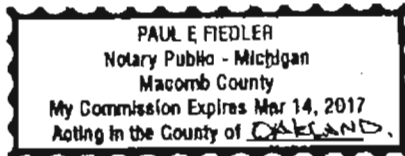
COUNTY OF OAKLAND)

SUBSCRIBED AND SWORN to before me this 3rd day of October, 2012

[Signature]

Notary Public

My Commission Expires:



Contract No.: 2012-148-COS

DATED: _____

DESERT MOUNTAIN PROPERTIES, L.L.P.

By: _____

Print: _____

Its: _____

STATE OF _____)

) SS

COUNTY OF _____)

SUBSCRIBED AND SWORN to before me this _____ day of October, 2012

Notary Public

My Commission Expires:

Contract No.: 2012-148-COS

DATED: _____

NEWMAN JOLLY BUILDERS, L.L.C.

By: _____

Print: _____

Its: _____

STATE OF _____)

) SS

COUNTY OF _____)

SUBSCRIBED AND SWORN to before me this _____ day of October, 2012

Notary Public

My Commission Expires:

Contract No.: 2012-148-COS

DATED: _____

CITY OF SCOTTSDALE, an Arizona Municipal
Corporation

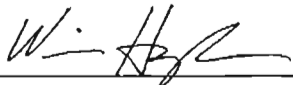
By: _____

W.J. "Jim" Lane, Mayor

ATTEST

Carolyn Jagger, City Clerk

APPROVED AS TO FORM:



Bruce Washburn, City Attorney

By: William Hylen, Assistant City Attorney

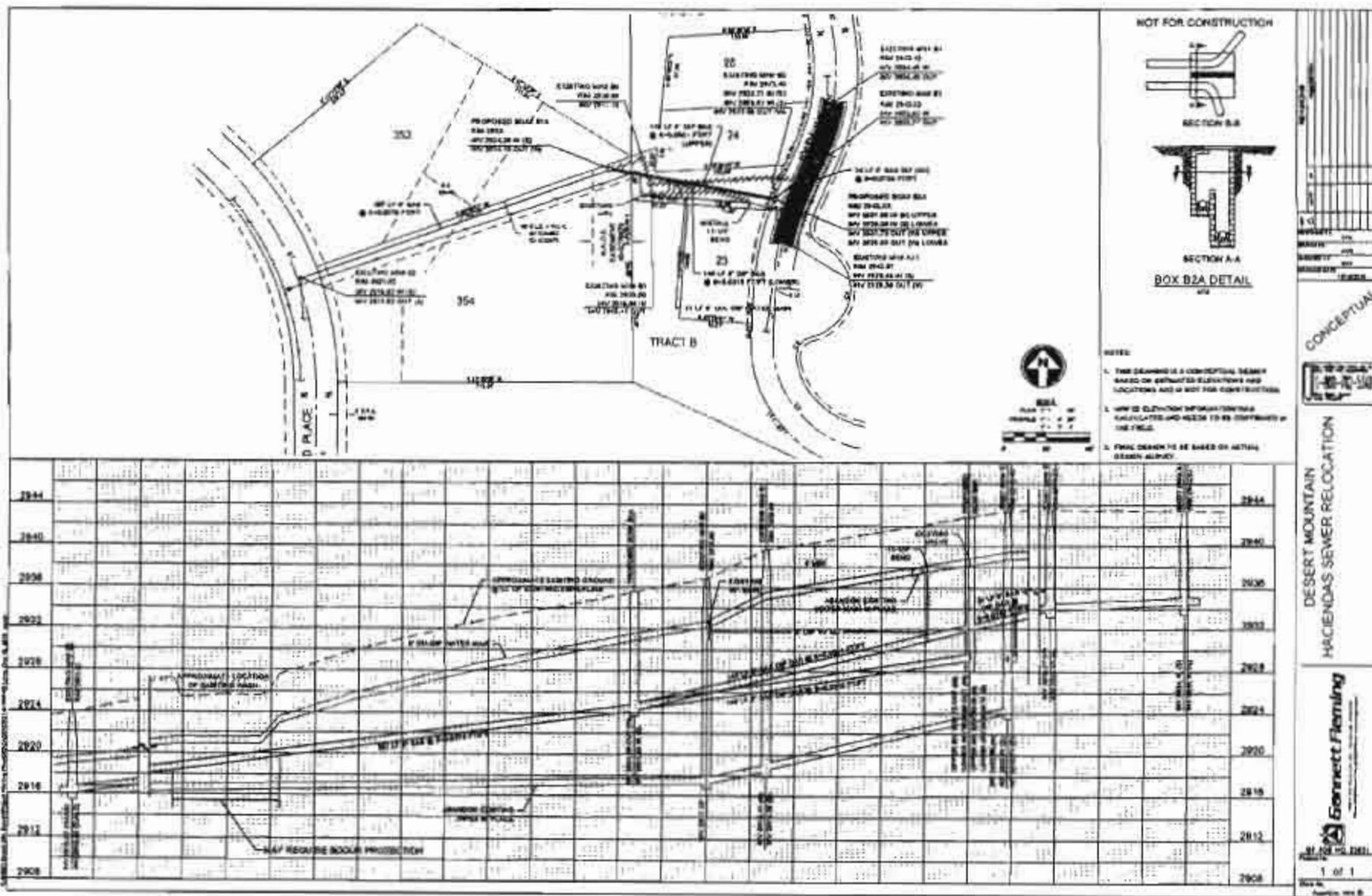


Exhibit A
Page 1 of 1

Contract No. 2012-148-COS

Douglas M. Schumacher, Esq. - Arizona State Bar No. 012876
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Telephone: (480) 315-8807
E-Mail: dmschumacher@qwestoffice.net

Attorneys for Plaintiffs Keith A. Johnson, Cheryl A. Johnson
and The Keith A. Johnson Family Trust

THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

KEITH A. JOHNSON and CHERYL A.
JOHNSON, husband and wife; and THE
KEITH A. JOHNSON FAMILY TRUST;

Plaintiffs,

vs.

DESERT MOUNTAIN PROPERTIES
LIMITED PARTNERSHIP, a Delaware
Limited Partnership; NEWMAN JOLLY
BUILDERS, LLC, an Arizona Limited
Liability Company; JOHN and JANE DOES,
I-X; BLACK and WHITE PARTNERSHIPS
and ABC CORPORATIONS, I-X,

Defendants.

Cause No. CV2010-051572

**STIPULATION FOR
DISMISSAL WITH PREJUDICE**

(Assigned to the Honorable Michael
Gordon)

Plaintiffs Keith A. Johnson, Cheryl A. Johnson and The Keith A. Johnson Family
Trust (herein collectively referred to as "Johnson"), and Defendants Desert Mountain
Properties Limited Partnership and Newman Jolly Builders, by and through counsel, and
pursuant to Rule 41, *Arizona Rules of Civil Procedure*, and the Settlement & Release
Agreement, hereby stipulate to the dismissal of this entire matter, with prejudice, each and
every party to bear their own attorneys' fees, costs and expenses.

1 DATED this ____ day of _____, 2012. DATED this ____ day of _____, 2012.

2 DOUGLAS M. SCHUMACHER, P.C. FENNEMORE CRAIG, P.C.

3
4 /s/ Douglas M. Schumacher, Esq. /s/ John Randall Jefferies, Esq.
5 16622 E. Avenue of the Fountains, Suite 202 3003 N. Central Ave., Suite 2600
6 Fountain Hills, Arizona 85268-8317 Phoenix, Arizona 85012
7 Attorneys for Plaintiffs Keith A. Johnson, Cheryl A. Johnson and The Keith A. Johnson Family Trust Attorneys for Defendant Desert Mountain Properties Limited Partnership

8 DATED this ____ day of _____, 2012. DATED this ____ day of _____, 2012.

9 HOLLOWAY ODEGARD FORREST & KELLY PC City of Scottsdale

10
11 /s/ Peter C. Kelly, II, Esq. /s/ William Hylen, Esq.
12 3101 N. Central Ave., Suite 1200 SCOTTSDALE CITY ATTORNEY'S OFFICE
13 Phoenix, Arizona 85012-0001 3939 N. Drinkwater Blvd.
Attorneys for Defendant Newman Jolly Builders, LLC Scottsdale, Arizona 85251
Attorney for City of Scottsdale

14 Original of the foregoing electronically
15 filed with the Clerk of the Court this
16 ____ day of _____, 2012, and a Copy of
the foregoing electronically transmitted
via the Clerk's office & via facsimile to:

17 The Honorable Michael Gordon
18 SUPERIOR COURT OF ARIZONA - MARICOPA COUNTY
19 18380 N. 40th Street
Phoenix, Arizona 85032

20 Copy of the foregoing was
21 mailed ☒, e-mailed ☒, &/or faxed ☐,
this ____ day of _____, 2012, to:

22 John Randall Jefferies, Esq.
23 Kyle Hallstrom, Esq.
24 FENNEMORE CRAIG, P.C.
3003 N. Central Ave., Suite 2600
Phoenix, Arizona 85012
Attorneys for Defendant Desert Mountain Properties Limited Partnership

25 ...

26 ...

1 Peter C. Kelly, II, Esq.
2 Jesse M. Showalter, Esq.
3 HOLLOWAY ODEGARD FORREST & KELLY PC
4 3101 N. Central Ave., Suite 1200
5 Phoenix, Arizona 85012-0001
6 Attorneys for Defendant Newman Jolly Builders, LLC

7 William Hylan, Esq.
8 SCOTTSDALE CITY ATTORNEY'S OFFICE
9 3939 N. Drinkwater Blvd.
10 Scottsdale, Arizona 85251
11 Attorney for City of Scottsdale

12 /s/ Douglas M. Schumacher
13 _____
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Douglas M. Schumacher, Esq. - Arizona State Bar No. 012876
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Attorneys for Plaintiffs Keith A. Johnson, Cheryl A. Johnson
and The Keith A. Johnson Family Trust

THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

KEITH A. JOHNSON and CHERYL A.
JOHNSON, husband and wife; and THE
KEITH A. JOHNSON FAMILY TRUST;

Plaintiffs,

vs.

DESERT MOUNTAIN PROPERTIES
LIMITED PARTNERSHIP, a Delaware
Limited Partnership; NEWMAN JOLLY
BUILDERS, LLC, an Arizona Limited
Liability Company; JOHN and JANE DOES,
I-X; BLACK and WHITE PARTNERSHIPS
and ABC CORPORATIONS, I-X,

Defendants.

Cause No. CV2010-051572

**ORDER FOR DISMISSAL WITH
PREJUDICE**

(Assigned to the Honorable Michael
Gordon)

Pursuant to the signed Stipulation of the parties, and good cause appearing therefore;
IT IS HEREBY ORDERED dismissing this action in its entirety **with prejudice**, each
party to bear its own costs and attorney's fees incurred herein.

DONE IN OPEN COURT this ____ day of _____, 2012.

The Honorable Michael Gordon
Maricopa County Superior Court of Arizona

1 Original of the foregoing electronically
2 filed with the Clerk of the Court this
3 ____ day of ____, 2012, and
4 copies of the foregoing were
5 mailed ☐, e-mailed, &/or faxed ☐,
6 this ____ day of ____, 2012, to:

7 Douglas M. Schumacher, Esq.
8 DOUGLAS M. SCHUMACHER, P.C.
9 16622 E. Avenue of the Fountains, Suite 202
10 Fountain Hills, Arizona 85268-8317
11 Attorney for Plaintiffs Keith A. Johnson, Cheryl A. Johnson
12 and The Keith A. Johnson Family Trust

13 John Randall Jefferies, Esq.
14 Kyle Hallstrom, Esq.
15 FENNEMORE CRAIG, P.C.
16 3003 N. Central Ave., Suite 2600
17 Phoenix, Arizona 85012
18 Attorneys for Defendant Desert Mountain Properties Limited Partnership

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23 Phoenix, Arizona 85012-0001
24 Attorneys for Defendant Newman Jolly Builders, LLC

25 William Hylan, Esq.
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28 Scottsdale, Arizona 85251
Attorney for City of Scottsdale